No. 17-1351

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland (8:17-cv-00361-TDC)

BRIEF AMICUS CURIAE OF VIRGINIA, MARYLAND, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MAINE, MASSACHUSETTS, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, WASHINGTON, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF APPELLEES AND AFFIRMANCE

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTERESTS OF AMICI 1

ARGUMENT: THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE PRELIMINARY INJUNCTION 4

I. The district court did not abuse its discretion in finding that Plaintiffs are likely to prove that EO-2 violates the Establishment Clause. 5

A. A law is invalid when its predominant purpose is to disadvantage a particular religion. 5

B. The evidence of President Trump's anti-Muslim animus was overwhelming and unrebutted. 8

C. The President's campaign statements are admissible. 16

D. Limiting the travel ban to six overwhelming Muslim countries does not cleanse the taint of religious animus. 19

E. The President cannot be empowered by Congress to violate the Establishment Clause. 20

II. The district court did not abuse its discretion in balancing the equities and determining that an injunction serves the public interest. 22

A. Defendants produced no evidence that the injunction would harm national security. 22

B. The injunction is necessary to prevent harm to States' proprietary interests. 24

C. The injunction is necessary to prevent harm to States' quasi-sovereign and sovereign interests..29

D. Preventing constitutional violations serves the public interest. 31

CONCLUSION 32

CERTIFICATE OF SERVICE 35

TABLE OF AUTHORITIES

Page

CASES

Agostini v. Felton,
521 U.S. 203 (1997) 21

Alfred L. Snapp & Son., Inc. v. Puerto Rico,
458 U.S. 592 (1982) 29, 30

Aziz v. Trump,
No. 1:17cv116, 2017 WL 465918 (E.D. Va. Feb. 3, 2017) 29

Aziz v. Trump,
No. 1:17cv116, 2017 WL 580855 (E.D. Va. Feb. 13, 2017) 1, 12, 20

Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet,
512 U.S. 687 (1994) 7

Bowsher v. Synar,
478 U.S. 714 (1986) 20

California v. United States,
438 U.S. 645 (1978) 17

Centro Tepeyac v. Montgomery Cty.,
722 F.3d 184 (4th Cir. 2013) 4, 16, 22, 31

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 6, 8

Engel v. Vitale,
370 U.S. 421 (1962) 30

Epperson v. Arkansas,
393 U.S. 97 (1968) 6

Everson v. Bd. of Educ.,
330 U.S. 1 (1947) 2, 3

Hawai'i v. Trump,
No. 1:17cv00050, 2017 WL 1011673 (D. Haw. Mar. 15, 2017),
reaffirmed, 2017 WL 1167383 (D. Haw. Mar. 29, 2017) 1, 19, 24

Hein v. Freedom From Religion Found., Inc.,
551 U.S. 587 (2007) 21

INS v. Chadha,
462 U.S. 919 (1983) 20, 21

Kerry v. Din,
135 S. Ct. 2128 (2015) 22

Kleindienst v. Mandel,
408 U.S. 753 (1972) 22

Korematsu v. United States,
323 U.S. 214 (1944) 23

Korematsu v. United States,
584 F. Supp. 1406 (N.D. Cal. 1984) 24

Larson v. Valente,
456 U.S. 228 (1982) 6

McCreary Cty. v. ACLU,
545 U.S. 844 (2005) 7, 17, 18, 19

Metro. Reg'l Info. Sys., Inc. v. Am. Home Realty Network, Inc.,
722 F.3d 591 (4th Cir. 2013)..4

Nken v. Holder,
556 U.S. 418 (2009) 5

Plessy v. Ferguson,
163 U.S. 537 (1896) 31

Printz v. United States,
521 U.S. 898 (1997) 18

Santa Fe Indep. Sch. Dist. v. Doe,
530 U.S. 290 (2000) 6, 7

Sarsour v. Trump,
No. 1:17cv00120, 2017 WL 1113305 (E.D. Va. Mar. 24, 2017) 16

Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.,
135 S. Ct. 2507 (2015) 8

Wallace v. Jaffree,
472 U.S. 38 (1985) 7

Washington v. Seattle Sch. Dist. No. 1,
458 U.S. 457 (1982) 17

Washington v. Trump,
847 F.3d 1151 (9th Cir. 2017) 1, 12, 24

Winter v. Nat'l Res. Defense Council, Inc.,
555 U.S. 7 (2008) 4, 22

Zadvydas v. Davis,
533 U.S. 678 (2001) 20

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I .... passim

Cal. Const. art. I, § 4 ....3, 30

Cal. Const. art. I, §§ 7-8, 31 30

Cal. Const. art. I, § 31 30

Conn. Const. art. I, § 3 3

Conn. Const. art. VII 3

Del. Const. art. I, § 1 3

Ill. Const. art. I, § 17 30

Ill. Const. art. I, § 3 ....3, 30

Iowa Const. art. I, § 3.....3

Mass. Const. art. II.....3

Mass. Const. art. III.....3

Md. Const. Decl. of Rts. art. 36.....3

Me. Const. art. I, § 3.....3

N.C. Const. art. I, § 13.....3

N.M. Const. art. II, § 11.....3

N.Y. Const. art. I, § 3.....3

Or. Const. art. I, §§ 2-3.....3

R.I. Const. art. I, § 3.....3

Va. Const. art. I, § 16.....2

Vt. Const. ch. 1, art. 3.....3

Wash. Const. art. I, § 11.....3

STATUTES

8 U.S.C. § 1152(a).....20

12 William Waller Hening,
The Statutes at Large 86 (1823).....2

Cal. Civ. Code § 51, subd. (b).....30

Cal. Gov't Code §§ 11135-11137.....30

Cal. Gov't Code §§ 12900-12996.....30

Conn. Gen. Stat. § 46a-60.....30

740 ILCS 23/5(a)(1).....30

775 ILCS 5/1-102(A).....30

775 ILCS 5/10-104(A)(1).....30

5 Me. Rev. Stat. Ann. § 784 30

5 Me. Rev. Stat. Ann. §§ 4551-4634 30

Md. Code Ann., State Gov't § 20-606 30

Mass. Gen. L. ch. ch. 93, § 102 30

Mass. Gen. L. ch. 151B, §§ 1, 4..30

Or. Rev. Stat. § 659A.006(1) 30

R.I. Gen. Laws § 28-5-7(1)(i) 30

9 Vt. Stat. Ann. §§ 4500-07 30

21 Vt. Stat. Ann. § 495 30

RULES

Fed. R. Evid. 401(a) 18

Fed. R. Evid. 402 18

TREATISES

Protecting the Nation From Foreign Terrorist Entry Into the United States, Executive Order 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017)........... passim

Protecting the Nation From Foreign Terrorist Entry Into the United States, Executive Order 13,780 (Mar. 6, 2017) .... passim

OTHER AUTHORITIES

Abha Bhattarai, *Even Canadians Are Skipping Trips to the U.S. After Trump Travel Ban*, Wash. Post (Apr. 14, 2017)...28

1 A.E. Dick Howard, *Commentaries on the Constitution of Virginia* (1974) 2

Anna Maria Barry-Jester, *Trump's New Travel Ban Could Affect Doctors, Especially In The Rust Belt And Appalachia*, FiveThirtyEight (Mar. 6, 2017)..29

Azadeh Ansari, *FBI: Hate crimes spike, most sharply against Muslims*, CNN (Nov. 15, 2016) 31

Coll. Bd., *2016-17 Tuition and Fees at Public Four-Year Institutions*....................26

Contributions of New Americans in Illinois, New Am. Econ., 2, 10 (Aug. 2016) 28

Decl. of Eric Sherzer, *Hawai'I v. Trump*, No. 1:17cv00050, ECF No. 154-3 (D. Haw. Mar. 13, 2017)....................27

Decl. of Michael F. Collins, M.D., *Louhghalam v. Trump*, No. 1:17cv10154, ECF No. 52-2 (D. Mass. Feb. 2, 2017)....................26

Decl. of Ross D. Lewin, *Hawai'i v. Trump*, No. 1:17cv00050, ECF No. 154-3 (D. Haw. Mar. 13, 2017).................... 26, 27

Derek Hawkins, *Worried about Trump's Travel Ban, Canada's Largest School District Calls Off U.S. Trips*, Wash. Post (Mar. 24, 2017)....................27

Inst. of Int'l Educ., *Int'l Students* (2015-16)....................25

James Madison, Memorial & Remonstrance Against Religious Assessments (June 20, 1785) 2

Kathy Frankovic, *The Revised Travel Ban, an Issue of Religious Freedom or One of Party Identification*, YouGov (Mar. 21, 2017) 31

Katie Reilly, *Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak,'* Time (Mar. 16, 2017)....................14

Linda Givetash, *Girl Guides of Canada Cancels All Trips to U.S. Over Trump's Travel Ban*, Huffington Post (Mar. 13, 2017)....................27

Miles Bryan, *10 Prospective UIC Students Ineligible to Enroll Due to Travel Ban*, WBEZ (Mar. 6, 2017)....................25

Randy Capps and Karina Fortuny, *Integration of Immigrants in Maryland's Growing Economy*, Urban Inst. (Mar. 2008) 28

Stephanie Saul, *Amid 'Trump Effect' Fear, 40% of Colleges See Dip in Foreign Applicants*, N.Y. Times (Mar. 16, 2017) 25

U.S. D.O.J., *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases* (May 20, 2011) 23

INTERESTS OF AMICI

The Amici States urge this Court to affirm the district court's preliminary injunction barring enforcement of § 2(c) of Executive Order 13,780 (EO-2). Section 2(c) bans for at least 90 days the entry of citizens from six overwhelmingly Muslim countries. Like its now-rescinded predecessor, Executive Order 13,769 (EO-1), EO-2 was issued to implement as nearly as possible the Muslim-travel ban that President Trump promised as a candidate. Some of the Amici are litigating their own challenges to EO-1 and EO-2.[1] Others have filed amicus briefs supporting those efforts.[2] All are adversely affected by the ban.

Allowing the travel ban to take effect would cause irreparable harm. It would block entry by law-abiding students, teachers, workers, and tourists from the six majority-Muslim countries. It would harm our citizens, lawful permanent residents, and resident visa holders, many of whom have family members and loved ones who would be presumptively denied entry. And it would amplify the message of fear and intimidation communicated to our Muslim communities by a President who has promised to single out Muslims for disfavored treatment.

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[1] *See Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017); *Aziz v. Trump*, No. 1:17cv116, 2017 WL 580855, at *1 (E.D. Va. Feb. 13, 2017) (granting Virginia's preliminary-injunction motion against EO-1).

[2] N.Y. Amicus Br. (15 States and D.C.), *Washington*, ECF No. 58-2; Ill. Amicus Br. (13 States and D.C.), *Hawai'i v. Trump*, No. 1:17cv00050, 2017 WL 1011673 (D. Haw. Mar. 15, 2017), ECF No. 154-3; Ill. Amicus Br. (16 States and D.C.), *Aziz*, ECF No. 84.

The Amici States have a unique perspective, not only because these injuries are being inflicted on our State institutions and residents, but also because our State constitutions prohibit the government from preferring one religion over another or punishing someone on account of their religious beliefs. The section of Virginia's Constitution that protects religious freedom "brought together in one place Madison's and Jefferson's classic statements on religious liberty."[3] The first sentence comes from Madison's Memorial and Remonstrance Against Religious Assessments, which recognized that religion "can be directed only by reason and conviction, not by force or violence," and must be left to the "conscience" of each person.[4] The second sentence, from Jefferson's Bill for Religious Liberty, states that "no man … shall … suffer on account of his religious opinions … in matters of religion, and that the same shall in no wise diminish enlarge or affect their civil capacities."[5] The Supreme Court has recognized that because "Madison and

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[3] 1 A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 292 (1974). *See also* Va. Const. art. I, § 16.

[4] Memorial & Remonstrance Against Religious Assessments ¶ 1, *reprinted in Everson v. Bd. of Educ.*, 330 U.S. 1, 64 (1947) (appendix).

[5] An act for establishing religious freedom (ch. 34, 1785), 12 William Waller Hening, *The Statutes at Large* 86 (1823).

Jefferson played such leading roles" in the "drafting and adoption" of the religion clause of the First Amendment, those provisions have the "same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute" for religious freedom.[6] Today, the Amici States' constitutions *all* enshrine identical or similar protections.[7]

The Amici States urge the Court to affirm the preliminary injunction because (1) the district court correctly determined that Plaintiffs are likely to succeed in showing that § 2(c) has the purpose of excluding Muslims and therefore violates the Establishment Clause of the First Amendment; (2) the balance of hardship tilts decidedly in Plaintiffs' favor because Defendants failed to adduce any evidence that they would be harmed by temporarily preserving the status quo that existed before EO-2; and (3) the public interest—including the interests of the States and their residents—strongly favors enjoining an unconstitutional executive order that fulfills the President's campaign promise to block Muslims from entering the country.

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[6] *Everson*, 330 U.S. at 13. *See also id*. at 11-13 (describing drafting history); *id*. at 33 (Rutledge, J., dissenting) ("No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment."); *id*. at 33-40 (recounting that history).

[7] *See* Cal. Const. art. I, § 4; Conn. Const. art. I, § 3; *id*. art. VII; Del. Const. art. I, § 1; Ill. Const. art. I, § 3; Iowa Const. art. I, § 3; Me. Const. art. I, § 3; Md. Const. Decl. of Rts. art. 36; Mass. Const. arts. II, III; N.M. Const. art. II, § 11; N.Y. Const. art. I, § 3; N.C. Const. art. I, § 13; Or. Const. art. I, §§ 2-3; R.I. Const. art. I, § 3; Vt. Const. ch. 1, art. 3; Wash. Const. art. I, § 11.

ARGUMENT:
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE PRELIMINARY INJUNCTION

This Court "review[s] the district court's decision to grant a preliminary injunction for abuse of discretion, assessing its factual determinations for clear error and its legal conclusions de novo."[8] The decision "will not be disturbed on appeal unless the record shows an abuse of that discretion, regardless of whether the appellate court would, in the first instance, have decided the matter differently."[9] Whether to issue a preliminary injunction is guided by the four-factor test in *Winter v. Natural Resources Defense Council, Inc.*, under which the movant must establish "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest."[10]

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[8] *Metro. Reg'l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*, 722 F.3d 591, 595 (4th Cir. 2013); *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 188 (4th Cir. 2013) (en banc) (same).

[9] *Centro Tepeyac*, 722 F.3d at 188 (citation omitted).

[10] *Id.* (quoting *Winter*, 555 U.S. 7, 20 (2008)).

As for Defendants' request for a stay pending appeal of the preliminary injunction, they—not Plaintiffs—bear the burden of showing that a stay is warranted by the same four factors, the two "most critical" being Defendants' need to show that they are "likely to succeed on the merits" of their appeal and "will be irreparably injured absent a stay."[11]

I. The district court did not abuse its discretion in finding that Plaintiffs are likely to prove that EO-2 violates the Establishment Clause.

Because they did not deny the truth of Plaintiffs' evidence of religious animus, Defendants cannot show that the district court committed clear error or abused its discretion when evaluating Plaintiffs' evidence of an Establishment Clause violation. Although Defendants urge this Court to ignore some of Plaintiffs' factual evidence, they do not dispute the *legal consequence* of a finding that President Trump acted with animus towards Muslims.[12] Put simply, EO-2 violates the Establishment Clause if President Trump's primary purpose in issuing it was to keep his campaign promise to ban Muslims from entering the country.

A. A law is invalid when its predominant purpose is to disadvantage a particular religion.

The Establishment Clause of the First Amendment prohibits any "law

[11] *Nken v. Holder*, 556 U.S. 418, 433-34 (2009).

[12] *See, e.g.*, J.A.722:4-9.

respecting an establishment of religion, or prohibiting the free exercise thereof."[13] Crucial to this case are three core Establishment Clause principles.

First, "the First Amendment forbids an official purpose to disapprove of a particular religion."[14] The Amendment imposes an "absolute" prohibition on the government's adoption of "programs or practices … which 'aid or oppose' any religion."[15]

Second, even where a challenged law is facially neutral, it violates the Establishment Clause if it is enacted for a religious purpose. "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."[16] Thus, in *Board of Education of Kiryas Joel Village School District v. Grumet*, the Court invalidated a state statute defining a facially neutral school-district boundary because the legislative history showed that the district was drawn to benefit a particular religious sect.[17] The Court emphasized there that "our analysis does not end with the text of the statute at issue."[18]

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[13] U.S. Const. amend. I.

[14] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (collecting cases).

[15] *Larson v. Valente*, 456 U.S. 228, 246 (1982) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968)).

[16] *Hialeah*, 508 U.S. at 534. *See also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307 n.21 (2000) ("Even if the plain language … were facially neutral, the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.") (citation omitted).

Third, the Court made clear in *McCreary County v. ACLU* that the presence of a secular purpose will not save a law where the secular purpose is "*merely secondary* to a religious objective," such that the law was in fact enacted with "a *predominantly* religious purpose."[19] "When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.'"[20]

To be sure, "[o]ne consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage."[21] This "presents no incongruity, however, because purpose matters."[22] Nor does the potential difficulty of discerning purpose insulate facially neutral actions from scrutiny. As Justice Alito recently noted, "[n]o one thinks that those who harm others because of protected characteristics should escape liability by conjuring up neutral excuses."[23] Indeed, "federal judges have decades of experience sniffing out pretext."[24]

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[17] 512 U.S. 687, 699, 702 (1994).

[18] *Id.* at 699.

[19] 545 U.S. 844, 862, 864 (2005) (emphasis added).

[20] *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring in the judgment)).

[21] *McCreary*, 545 U.S. at 866 n.14.

[22] *Id.*

These principles show that the district court's central legal ruling was correct: facially-neutral government action violates the Establishment Clause "[i]f a religious purpose for the government action is the predominant or primary purpose, and the secular purpose is 'secondary.'"[25] As the Acting U.S. Solicitor General has conceded, that predominant-purpose test applies here.[26]

B. The evidence of President Trump's anti-Muslim animus was overwhelming and unrebutted.

The district court did not abuse its discretion in concluding that Plaintiffs are likely to succeed in proving an Establishment Clause violation because the unrebutted evidence of the President's anti-Muslim animus is sufficient to discredit both EO-1 and EO-2. Then-candidate Trump labeled the immigration policy he announced while campaigning in December 2015 "Preventing Muslim

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[23] *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2550 (2015) (Alito, J., dissenting) (citing *Hialeah*, 508 U.S. at 541-42).

[24] *Id.*

[25] J.A.795.

[26] J.A.722:4-9.

Immigration."[27] He urged "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what the hell is going on."[28] He insisted that "Islam hates us."[29] He supported heavy surveillance of mosques and databases to track all Muslims.[30] He repeatedly stated his belief that "we're having problems with the Muslims, and we're having problems with Muslims coming into the country."[31] And he justified his proposed Muslim ban by invoking the example of internment camps during World War II, saying that "what I am doing is no different than what FDR – FDR's solution for Germans, Italians, Japanese, you know, many years ago."[32]

On July 24, 2016, when asked whether his shift in focus from Muslims to Middle Eastern countries reflected a retreat from his proposed Muslim ban, Trump said,

> [I] actually don't think it's a rollback. In fact, you could say it's an expansion. I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And

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[27] J.A.346.

[28] J.A.341.

[29] J.A.516.

[30] J.A.473.

[31] J.A.522.

[32] J.A.513.

> I'm okay with that, because I'm talking territory instead of Muslim.[33]

On December 21, 2016, after attacks in Germany and Turkey, Trump claimed that he had been "proven to be right" and stated that "[y]ou know my plans."[34]

The President's anti-Muslim statements did not cease on January 20, 2017, when he swore an oath to uphold the Constitution. One week after taking office, he claimed that Muslims had been given preferences for immigration over Christians, which "was very, very unfair. So we are going to help them."[35] In announcing EO-1 later that day, he read the title—"'Protection of the Nation from Foreign Terrorist Entry into the United States'"—and added "We all know what that means."[36] It was no abuse of discretion to interpret that comment to refer derogatorily to Muslims.[37]

Strong circumstantial evidence also corroborated that EO-1 was driven predominantly by anti-Muslim animus, rather than genuine security concerns. EO-1 did not result from the usual process in which the Executive Branch develops national-security policies based on "(1) specific, credible threats based on individualized information, (2) the best available intelligence and (3) thorough interagency legal and policy review."[38] Instead, it was written by White House policy staff without vetting by the Department of Homeland Security, the State Department, the Department of Defense, or the National Security Council.[39] Two days after its issuance, presidential advisor Rudolph Giuliani revealed that the President had sought his help to craft a Muslim ban that would withstand judicial scrutiny: "when [Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"[40]

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[33] J.A.481.

[34] J.A.506.

[35] J.A.462.

[36] J.A.403.

[37] J.A.797-98.

The stated security justification for EO-1 also corroborated its discriminatory origins. The order invoked the terrorist attacks of September 11 to justify a 90-day ban on entry by citizens of Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.[41] But *none* of the terrorists came from those countries, and the countries from which they actually hailed were not covered by the travel ban.[42] Indeed, Defendants did not rebut the National Security Experts' declaration below that "[s]ince September 11, 2001, not a single terrorist attack in the United States has been perpetrated by aliens from the countries named in the Order."[43]

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[38] J.A.666.

[39] J.A.384, 397.

[40] J.A.508.

[41] J.A.438.

[42] J.A.665 (National Security Experts' Declaration).

On February 3, a federal district court judge in Washington State entered a temporary restraining order against EO-1, which the Ninth Circuit declined to stay.[44] On February 13, Judge Brinkema of the Eastern District of Virginia issued a preliminary injunction against enforcement of the travel ban in Virginia.[45] Judge Brinkema canvassed much of the same evidence described above and concluded that Virginia had "produced unrebutted evidence supporting its position that it is likely to succeed on an Establishment Clause claim."[46] She noted that "[t]he 'Muslim ban' was a centerpiece of the president's campaign for months, and the press release calling for it was still available on his website as of the day this Memorandum Opinion is being entered."[47]

On February 16, the Government informed the Ninth Circuit that the President intended "to rescind [EO-1] and replace it with a new, substantially revised Executive Order to eliminate what the panel erroneously thought were constitutional concerns."[48] But EO-2 was not issued until March 6. Defendants did not dispute that part of the delay was to capitalize on positive publicity the White House perceived after the President's March 1 address to Congress.[49] That delay further undermines the President's national-security justification.

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[43] *Id.*

[44] *Washington v. Trump*, No. 17cv141, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (Robart, J.), *stay denied*, 847 F.3d 1151 (9th Cir. 2017), *rehearing en banc denied*, 2017 WL 992527 (9th Cir. Mar. 15, 2017).

[45] *Aziz*, 2017 WL 580855, at *11.

[46] *Id.* at *8.

[47] *Id.*

That EO-2's scope is different from EO-1's does not eliminate the taint of its discriminatory origins. EO-2 keeps the travel ban for six of the seven countries covered by EO-1, except that it now exempts citizens of those countries who are lawful permanent residents or resident visa holders in the United States on the order's effective date. EO-2 states that this change is designed to save the government from "spending additional time pursuing litigation" by "exclud[ing] … aliens that have prompted judicial concerns."[50] Because the drafters so readily deleted these provisions, it is a fair inference that the deleted provisions were never motivated or supported by valid security concerns.

Additional evidence also supported the district court's conclusion that Plaintiffs would likely succeed in proving that EO-2 was driven by the same religious animus as its predecessor. Senior White House Policy Advisor Stephen Miller said that EO-2 would implement the "same basic policy outcome" as EO-1;[51] White House Press Secretary Sean Spicer said that the "principles of the [original] executive order remain the same";[52] and President Trump himself admitted that EO-2 was "a watered down version of the first one."[53]

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[48] Suppl. Br. on En Banc Consideration at 4, *Washington v. Trump*, No. 17-35105, ECF No. 154, http://cdn.ca9.uscourts.gov/datastore/general/2017/02/16/17-35105%20-%20Government%20supplemental%20brief.pdf.

[49] J.A.537.

[50] EO-2, § 1(i).

Still more evidence bolsters the conclusion that the national-security concerns mentioned in EO-2 are pretextual. EO-2 omits all references to the September 11 attacks—the stated justification for EO-1—but still describes each of the original seven nations as a "state sponsor of terrorism"[54] and lists general concerns about security in those countries.[55] The "[r]ecent history" that EO-2 specifies, however, seriously undercuts Defendants' security claims:

- EO-2 cites two Iraqis convicted in 2013 of terrorism-related felonies, but the travel ban *exempts* Iraq altogether;[56]

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[51] J.A.579.

[52] J.A.379.

[53] Katie Reilly, *Read President Trump's Response to the Travel Ban Ruling: It 'Makes Us Look Weak,'* Time (Mar. 16, 2017), http://time.com/4703622/president-trump-speech-transcript-travel-ban-ruling/.

[54] § 1(d).

[55] § 1(e)(i)-(vi).

[56] § 1(h).

- EO-2 cites the 2014 conviction of a naturalized *American* citizen who was brought to the United States as a "child" from Somalia (when he was one or two years old),[57] but EO-2 does not apply to naturalized Americans either; and

- EO-2 cites 300 persons under investigation who entered the United States as refugees, but without saying if they came from the banned countries[58]—something the White House declined to answer when pressed[59]—and without mentioning that 300 is a tiny fraction of the total number of annual terrorism assessments.[60]

The government has also never offered any national-security justification for resetting to zero the original 90-day travel ban imposed by EO-1. The ostensible purpose of the 90-day period was "to reduce investigative burdens to relevant agencies" as they conduct their internal review of procedures.[61] The Acting U.S. Solicitor General admitted below that the review process began upon issuance of EO-1.[62] Yet when EO-2 was issued more than seven weeks after EO-1, it started the 90-day period anew. Defendants do not say why. That reset strongly suggests that the President was simply seeking to fulfill his campaign promise to ban Muslims, for the same 90-day period he planned under EO-1.

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[57] *Id.*; J.A.552-53.

[58] § 1(h).

[59] J.A.379.

[60] J.A.414 (identifying 11,667 assessments during four-month period from December 2008 through March 2009).

[61] EO-1, § 3(c); EO-2, § 2(c).

[62] J.A.728:10-18.

In short, the district court did not abuse its discretion in concluding that the evidence "provide[s] a convincing case that the purpose of [EO-2] remains the realization of the long-envisioned Muslim ban."[63] To be sure, another district court reached a different conclusion, finding the changes to EO-2 sufficient to purge the taint of religious animus behind EO-1.[64] But the question here is not whether a different judge or even this Court "would, in the first instance, have decided the matter differently."[65] Rather, this Court must sustain the preliminary injunction so long as it is within "the sound discretion of the trial court."[66] The record confirms that Judge Chuang's assessment of the merits was amply supported by the unrebutted evidence before him.

C. The President's campaign statements are admissible.

Defendants are wrong to insist that the Court must ignore the President's pre-inaugural promises to ban the entry of Muslims. Even if the Court were to do so, the district court's decision was supported by ample post-inauguration evidence, including statements by Trump, Giuliani, Miller, and Spicer. But Defendants' argument that the Court may not consider campaign statements is meritless. As in *McCreary*, Defendants are not entitled to have the Court "ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show."[67] That approach "bucks common sense," for "reasonable observers have reasonable memories, and our precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.'"[68]

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[63] J.A.799.

[64] *Sarsour v. Trump*, No. 1:17cv00120, 2017 WL 1113305, at *12 (E.D. Va. Mar. 24, 2017) (Trenga, J.).

[65] *Centro Tepeyac*, 722 F.3d at 188 (citation omitted).

[66] *Id.* (citation omitted).

Defendants also wrongly suggest that no precedent allows a court to determine official motive by examining the statements of a private citizen who is not yet a government actor. In *Washington v. Seattle School District No. 1*, for instance, the Supreme Court found evidence of racial motive in the private proponents' campaign statements supporting an otherwise facially-neutral statewide initiative to restrict busing.[69] Courts have looked to party platforms to discern the purpose of legislative enactments,[70] and they routinely consider the private citizens' statements in *The Federalist* as "indicative of the original understanding of the Constitution."[71] Our "common sense" likewise tells us that Trump's pre-election promise to ban Muslims is "perfectly probative evidence" of his motive.[72]

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[67] 545 U.S. at 866.

[68] *Id.* (citation omitted).

[69] 458 U.S. 457, 463, 471 (1982).

[70] *See, e.g.*, *California v. United States*, 438 U.S. 645, 663-64 (1978) (relying on statements in party platforms as evidence of Reclamation Act's intended purpose and meaning).

Though a fact finder might choose to give less evidentiary weight to a campaign statement compared to the official's words and deeds after taking office, that choice goes to the campaign statement's weight, not its admissibility. "Relevant evidence is admissible" unless prohibited by the Constitution, federal statute, or the rules of evidence.[73] Defendants have identified no such barrier here. Evidence is "relevant if … it has any tendency to make a fact more or less probable than it would be without the evidence."[74] The President's campaign promise to ban Muslim travel is admissible because it makes it more likely that the President *intended* to ban Muslim travel when he signed executive orders that have the effect of banning Muslim travel.

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[71] *Printz v. United States*, 521 U.S. 898, 910 (1997).

[72] *McCreary*, 545 U.S. at 866.

[73] Fed. R. Evid. 402.

[74] Fed. R. Evid. 401(a).

D. Limiting the travel ban to six overwhelming Muslim countries does not cleanse the taint of religious animus.

Contrary to Defendants' claims, EO-2 is not cleansed of its anti-Muslim animus because it applies only to six countries that account for just 10% of the world's Muslims.[75] Defendants have given fair warning that "the travel ban may be expanded after the 90 days expire and that other countries could be added to the list."[76] But even if the travel ban is not expanded, a plausible way to target Muslims is to pick countries like these six, which have "overwhelmingly Muslim populations that range from 90.7% to 99.8%."[77] As the *Hawai'i* court found, it takes "no paradigmatic leap to conclude that targeting these countries likewise targets Islam."[78] And that court was right to add that "[t]he illogic of the Government's contentions is palpable. The notion that one can demonstrate animus toward any group of people only by targeting all of them at once is fundamentally flawed."[79] The test under *McCreary* is whether EO-2 was issued for the predominant purpose of disadvantaging Muslims, not whether it succeeded in harming *all* Muslims. "It is a discriminatory purpose that matters, no matter how inefficient the execution."[80]

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[75] Br. of Appellants at 44.

[76] J.A.377.

[77] *Hawai'i*, 2017 WL 1011673, at *12.

[78] *Id*.

[79] *Id*.

E. The President cannot be empowered by Congress to violate the Establishment Clause.

The President's statutory authority to restrict entry by aliens under 8 U.S.C. § 1152(a), though undoubtedly broad, cannot insulate him from this Establishment Clause challenge; quite simply, Congress cannot authorize the President to violate the Constitution. As the Supreme Court made clear in *Zadvydas v. Davis*, Congress's "plenary power" over immigration "is subject to important constitutional limitations."[81] For example, in *INS v. Chadha*, the Court held that Congress's plenary power over immigration did not enable it to ignore the Constitution's structural requirements of bicameralism and presentment.[82] "The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty."[83]

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[80] *Aziz*, 2017 WL 580855, at *9.

[81] 533 U.S. 678, 695 (2001).

[82] 462 U.S. 919, 945-46, 951 (1983).

[83] *Bowsher v. Synar*, 478 U.S. 714, 730 (1986).

The Establishment Clause is another limitation on the exercise of federal power.[84] Just as Congress cannot exercise its plenary power over immigration in a manner that violates the Constitution, Congress's delegation of its immigration authority to the President also cannot empower him to violate the Constitution. "[W]hat is challenged here is whether [the President] has chosen a constitutionally permissible means of implementing that power."[85] Targeting Muslims on account of their religion plainly violates the Establishment Clause.

Defendants likewise misplace their reliance on the limited reviewability of consular decisions involving individual visa applicants. Even in that narrow context, the Supreme Court has left open the availability of judicial review to "look behind" the officer's proffered reasons if the claimant makes "an affirmative showing of bad faith on the part of the consular officer" that is "alleged with sufficient particularity."[86] That standard would be satisfied if it applied here because the evidence of the President's anti-Muslim animus is overwhelming.

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[84] *See Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 614 (2007) (plurality) (noting that a party with standing could challenge an executive agency's "bulk purchases of Stars of David, crucifixes, or depictions of the star and crescent for use in its offices or for distribution to the employees or the general public"); *id.* at 639-40 (Souter, J., dissenting) ("[N]o one has suggested that the Establishment Clause lacks applicability to executive uses of money."); *Agostini v. Felton*, 521 U.S. 203, 244 (1997) (Souter, J., dissenting) (describing the Establishment Clause as among the Constitution's "structural and libertarian guarantees").

[85] *Chadha*, 462 U.S. at 940-41.

II. The district court did not abuse its discretion in balancing the equities and determining that an injunction serves the public interest.

In addition to correctly finding that Plaintiffs are likely to succeed on their constitutional claims, the district court did not abuse its discretion in its analysis of the other *Winter* factors. *See Centro Tepeyac*, 722 F.3d at 191 (permitting balance of equities and public interest to be "jointly considered" and "deeming those 'factors established when there is a likely First Amendment violation'"). In light of the evidence that an injunction poses no harm to national security—and the absence of any contrary evidence in the record—the travel ban's demonstrable inequity justifies an injunction to protect the public interest and prevent injury to Plaintiffs and others throughout the Nation, including the Amici States.

A. Defendants produced no evidence that the injunction would harm national security.

The district court did not err in balancing the equities in Plaintiffs' favor because Defendants introduced no evidence to rebut the declaration of Plaintiffs' National Security Experts that maintaining the status quo pending litigation "would

[86] *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring); *accord Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (requiring "facially legitimate *and bona fide* reason") (emphasis added).

not jeopardize national security."[87] So the district court acted well within its discretion in concluding that "Defendants … have not shown, or even asserted, that national security cannot be maintained without an unprecedented six-country travel ban, a measure that has not been deemed necessary at any other time in recent history."[88]

Defendants ask the Court to take the President's word that the Executive Order is needed to protect national security, and to ignore the abundant evidence that the Order was motivated by religious animus that eclipses any genuine national-security concern. This is not the first time that a court has been asked to accept the Government's national-security justifications on blind faith in the face of serious constitutional problems.[89] From this country's experience with internment camps for law-abiding Japanese Americans, President Trump inexplicably draws the conclusion that targeting Muslims is permissible.[90] But the true lesson of *Korematsu* is that "the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability."[91] It took 40 years to vacate Fred Korematsu's convictions based on "substantial support in the record that the government deliberately omitted relevant information and provided misleading information in papers before the court."[92] History teaches that the President's claims should be entitled to appropriate respect, but not to unquestioning acceptance.

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[87] J.A.667.

[88] J.A.809.

[89] *See Korematsu v. United States*, 323 U.S. 214 (1944); U.S. D.O.J., *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases* (May 20, 2011), https://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases.

[90] J.A.513.

B. The injunction is necessary to prevent harm to States' proprietary interests.

As other courts considering EO-1 and EO-2 have recognized, the travel ban "would substantially injure the States,"[93] among others, by causing State universities to "suffer monetary damages and intangible harms" and causing State treasuries to "suffer a loss of revenue."[94]

Harm to State colleges and universities. The timing of the preliminary injunction coincides with the culmination of public universities' annual recruitment of students and faculty for the fall semester. Even a temporary reinstatement of the travel ban would discourage international candidates in the six countries from accepting offers of admission or employment. "Nearly 40 percent of colleges are reporting overall declines in applications from international students," with the "biggest decline" from the Middle East.[95] Any reinstatement would materially reduce acceptances, because foreign students will choose schools in Canada or elsewhere for fear they will be denied entry to the United States. For example, the ban would affect enrollment decisions of approximately half of all students newly admitted to University of Illinois at Chicago's civil engineering doctoral program.[96]

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[91] *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

[92] *Id*.

[93] *Washington*, 847 F.3d at 1169 (addressing EO-1).

[94] *Hawai'i*, No. 1:17cv00050, 2017 WL 1011673 at *9 (addressing EO-2), *reaffirmed*, 2017 WL 1167383, at *4 (D. Haw. Mar. 29, 2017).

More than 15,000 students from the six countries attended U.S. colleges and universities during the 2015-16 academic year.[97] Each prospective student deterred by the travel ban represents, on average, a loss of $24,930 in annual tuition and fees, plus revenue from student housing and living expenses.[98] The travel ban would also harm recruitment of faculty and researchers, many in specialized fields. For example, the University of Maryland relies on "more than 200 graduate students, post-doctoral fellows, and faculty from the six … countries" to staff its science laboratories.[99]

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[95] Stephanie Saul, *Amid 'Trump Effect' Fear, 40% of Colleges See Dip in Foreign Applicants*, N.Y. Times (Mar. 16, 2017), https://www.nytimes.com/2017/03/16/us/international-students-us-colleges-trump.html?_r=0.

[96] Miles Bryan, *10 Prospective UIC Students Ineligible to Enroll Due to Travel Ban*, WBEZ (Mar. 6, 2017), https://www.wbez.org/shows/wbez-news/10-prospective-uic-students-ineligible-to-enroll-due-to-travel-ban/d29224a4-fb11-4184-a8a9-f03fb45a3be1.

[97] Inst. of Int'l Educ., *Int'l Students* (2015-16), https://www.iie.org/Research-and-Insights/Open-Doors/Data/International-Students/All-Places-of-Origin/2015-16.

Harm to State medical institutions. EO-2's travel ban threatens States' public hospitals, which employ physicians and medical residents, research faculty, and postdoctoral researchers from the designated countries. Qualified individuals from designated countries have accepted job offers from Amici States' hospitals, but must await visa approval and are uncertain if or when they can start work.[100] Moreover, uncertainty created by EO-1 and EO-2 has had "a profound chilling effect" on international students' applications to State hospitals' residency programs and interposes "a major disincentive for hospitals to select foreign

[98] Coll. Bd., *2016-17 Tuition and Fees at Public Four-Year Institutions*, https://trends.collegeboard.org/college-pricing/figures-tables/2016-17-state-tuition-and-fees-public-four-year-institutions-state-and-five-year-percentage.

[99] Decl. of Ross D. Lewin, *Hawai'i*, No. 1:17cv00050, ECF No. 154-3, Ex. F at 8 & n.6 (D. Haw. Mar. 13, 2017).

[100] *See, e.g.*, Decl. of Michael F. Collins, M.D., *Louhghalam v. Trump*, No. 1:17cv10154, ECF No. 52-2, ¶ 9 (D. Mass. Feb. 2, 2017).

nationals for their residency programs."[101] The consequent risks of understaffing medical facilities threaten grave harm to the States and their inhabitants.

Lost tax revenues. Even before its implementation, EO-2 has cost Amici States significant tax revenues. Foreign students, tourists, and business visitors contribute to our State treasuries, not only by direct payments, such as tuition and fees, but also through tax receipts from businesses they patronize. EO-2 blocks thousands of travelers from entering Amici States, thereby halting their tax contributions.

The broader chilling effect on tourism will be much more extensive. Reports suggest a significant downturn in travel to the United States, both from the six countries and from other countries whose residents view the travel ban as an "unwelcome" sign. For instance, EO-2 has prompted Canada's largest school district and one of its nationwide youth organizations to suspend U.S. travel.[102] An estimated 4.3 million fewer people are expected to visit the United States this year, "resulting in $7.4 billion in lost revenue…. Next year, the fallout is expected to be even larger, with 6.3 million fewer tourists and $10.8 billion in losses."[103]

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[101] Decl. of Eric Sherzer, *Hawai'i v. Trump*, No. 1:17cv00050, ECF No. 154-3, Ex. I, ¶ 15 (D. Haw. Mar. 13, 2017).

[102] Derek Hawkins, *Worried about Trump's Travel Ban, Canada's Largest School District Calls Off U.S. Trips*, Wash. Post (Mar. 24, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/03/24/worried-about-trumps-travel-ban-canadas-largest-school-district-calls-off-u-s-trips/?utm_term=.c7d12d1b6019; Linda Givetash, *Girl Guides of Canada Cancels All Trips to U.S. Over Trump's Travel Ban*, Huffington Post (Mar. 13, 2017), http://www.huffingtonpost.ca/2017/03/13/girl-guides-of-canada-cancelling-u-s-trips-due-to-uncertain-entry-rules_n_15345468.html.

Lasting harm to States' economies. The ban also threatens more profound long-term economic harm. The ban's perceived bigotry threatens Amici States' ability to continue attracting and retaining foreign professionals, entrepreneurs, and companies that are veritable mainstays of our economies. For example, foreign-born residents comprise 22.1% of entrepreneurs and 37.7% of the software developers in Illinois;[104] and at least 27% of scientists, 21% of health care practitioners, and 19% of mathematicians and computer specialists in Maryland.[105]

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[103] Abha Bhattarai, *Even Canadians Are Skipping Trips to the U.S. After Trump Travel Ban*, Wash. Post (Apr. 14, 2017), https://www.washingtonpost.com/business/capitalbusiness/after-trumps-travel-ban-tourism-outfits-say-that-brand-usa-has-taken-a-hit/2017/04/14/d0eebf4e-158e-11e7-833c-503e1f6394c9_story.html.

[104] *See Contributions of New Americans in Illinois*, New Am. Econ., 2, 10 (Aug. 2016), http://www.newamericaneconomy.org/wp-content/uploads/2017/02/nae-il-report.pdf.

[105] Randy Capps and Karina Fortuny, *Integration of Immigrants in Maryland's Growing Economy*, Urban Inst. (Mar. 2008), http://www.urban.org/sites/default/files/publication/31521/411624-Integration-of-Immigrants-in-Maryland-s-Growing-Economy.pdf.

C. The injunction is necessary to prevent harm to States' quasi-sovereign and sovereign interests.

Reinstating the travel ban would also cause serious injury to States' quasi-sovereign interests in protecting residents' '"health and well-being—both physical and economic'"—and '"securing residents from the harmful effects of discrimination.'"[106]

Harm to residents' medical care. EO-2 will impair State residents' access to medical care, particularly in underserved communities. According to the Immigrant Doctors Project, approximately 7,000 doctors in the United States attended medical schools in the six designated countries.[107] These physicians, who "account for more than 14 million patient visits a year," are "more likely to work in underserved areas" and "practice in areas of medicine facing shortages, such as pediatrics and psychiatry …."[108] EO-2 casts doubt on visa renewals for many of these physicians and imposes a presumption that other physicians from the designated countries will be denied entry to the United States.

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[106] *Aziz v. Trump*, No. 1:17cv116, 2017 WL 465918, at *5 (E.D. Va. Feb. 3, 2017) (quoting *Alfred L. Snapp & Son., Inc. v. Puerto Rico*, 458 U.S. 592, 607, 609 (1982)).

[107] *See* https://immigrantdoctors.org/; Anna Maria Barry-Jester, *Trump's New Travel Ban Could Affect Doctors, Especially In The Rust Belt And Appalachia*, FiveThirtyEight (Mar. 6, 2017), https://fivethirtyeight.com/features/trumps-new-travel-ban-could-affect-doctors-especially-in-the-rust-belt-and-appalachia/.

[108] Barry-Jester, *supra* note 107.

Harm to States' enforcement of antidiscrimination laws. EO-2 threatens to undermine Amici States' constitutional and statutory commitments to tolerance and diversity. Each State has an interest in "securing observance of the terms under which it participates in the federal system,"[109] including the Establishment Clause. "It was in large part to get completely away from … systematic religious persecution that the Founders brought into being our Nation," with an express "prohibition against any governmental establishment of religion" to protect religious beliefs from "the pressures of government for change each time a new political administration is elected to office."[110]

To safeguard our residents' rights, Amici States have adopted constitutions and other laws that protect against discrimination, including laws prohibiting our residents, businesses, and state and local governments from conditioning employment and other opportunities on national origin and religion.[111] EO-2 offends these core expressions of State sovereignty and undermines the States' strong interest in discouraging messages of religious bias.

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[109] *Snapp*, 458 U.S. at 607-08

[110] *Engel v. Vitale*, 370 U.S. 421, 433, 429-30 (1962).

[111] *See, e.g.*, Cal. Const. art. I, §§ 4, 7-8, 31; Cal. Gov't Code §§ 11135-11137, 12900-12996; Cal. Civ. Code § 51, subd. (b); Conn. Gen. Stat. § 46a-60; Ill. Const. art. I, §§ 3, 17; 740 ILCS 23/5(a)(1); 775 ILCS 5/1-102(A); 775 ILCS 5/10-104 (A)(1); 5 Me. Rev. Stat. Ann. §§ 784, 4551-4634; Mass. Gen. L. ch. 151B, §§ 1, 4; id. ch. 93, § 102; Md. Code Ann., State Gov't § 20-606; Or. Rev. Stat.

Indeed, it bears mentioning that this case is taking place at a time when anti-Muslim hate crimes are on the rise.[112] In *Plessy v. Ferguson*, Justice Harlan condemned racial segregation because "the common government of all [should] not permit the seeds of race hate to be planted under the sanction of law."[113] EO-1 and EO-2 similarly have planted the seeds of anti-Muslim hate under the sanction of Presidential proclamations, as recognized by a majority of the public, who perceive EO-2 as "meant to target Muslims."[114]

D. Preventing constitutional violations serves the public interest.

As this Court reaffirmed in its *en banc* decision in *Centro Tepeyac*, "'upholding constitutional rights surely serves the public interest'"; indeed, the government '"is in no way harmed by issuance of a preliminary injunction which

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§ 659A.006(1); R.I. Gen. Laws § 28-5-7(1)(i); 9 Vt. Stat. Ann. §§ 4500-07; 21 Vt. Stat. Ann. § 495.

[112] Azadeh Ansari, *FBI: Hate crimes spike, most sharply against Muslims*, CNN (Nov. 15, 2016), http://www.cnn.com/2016/11/14/us/fbi-hate-crime-report-muslims/.

[113] 163 U.S. 537 (1896) (Harlan, J., dissenting).

[114] Kathy Frankovic, *The Revised Travel Ban, an Issue of Religious Freedom or One of Party Identification*, YouGov (Mar. 21, 2017), https://today.yougov.com/news/2017/03/21/revised-travel-ban-religion-and-party/.

prevents [it] from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction.'"[115]

CONCLUSION

Madison warned that when the government favors one religion over another, it changes our polity from one "offering an asylum to the persecuted and oppressed of every … Religion" to one that becomes "itself a signal of persecution."[116] The unrebutted evidence below shows that EO-1 and EO-2 seek to fulfill the President's promise to ban Muslims from entering the country. Accordingly, the district court did not abuse its discretion by enjoining the travel ban pending a trial on the merits.

Respectfully submitted,
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[115] 722 F.3d at 191 (citation omitted).

[116] *Everson*, 330 U.S. at 68 (quoting Madison's Remonstrance, ¶ 9).

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 6,487 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/
____
Stuart A. Raphael

CERTIFICATE OF SERVICE

I certify that on April 19, 2017, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system. In accordance with the Court's April 10, 2017 Order (Dkt. 108), sixteen (16) additional paper copies will be hand-delivered to the Court.

/s/

Stuart A. Raphael